(3)

No. 90-139

In The

Supreme Court of the United States

October Term, 1990

THE STATE OF TEXAS,

Petitioner,

vs.

JOHN SKELTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

RESPONDENT JOHN SKELTON'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

David L. Botsford
Counsel of Record

Alvis, Carssow, Cummins,
Hoeffner & Botsford, P.C.
800 Southwest Tower
7th at Brazos
Austin, Texas 78701
512/476-9121

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

OTHER:

No. 90-139

In The

Supreme Court of the United States

October Term, 1990

THE STATE OF TEXAS,

Petitioner,

vs.

JOHN SKELTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

RESPONDENT JOHN SKELTON'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

This supplemental brief is being submitted due to the following inadvertent error. On August 29, 1990, counsel for Respondent received a letter from counsel for Petitioner concerning Respondent's brief in opposition. Counsel for Respondent investigated the assertions of the letter and came to the realization, for the first time, that the copy of the State's motion for rehearing in the Court of Criminal Appeals which was available to him at the

time of the preparation of Respondent's brief in opposition did not contain all of the pages contained in the State's motion for rehearing. Due to that error, counsel for Respondent realized, to his ultimate embarrassment and horror, that the second, third and fourth reasons in opposition to the writ of certiorari contained in Respondent's brief inadvertently contained inaccurate assertions.

Counsel for Respondent immediately contacted co-counsel for Petitioner, Mr. Michael Griffin, and discussed the matter. Counsel for Respondent apologized to Mr. Griffin and informed Mr. Griffin that a supplemental brief would be filed to rectify the inadvertent error. Mr. Griffin acknowledged that he understood that the error had been inadvertent. Counsel for Respondent then called Mr. Chris Vasil and notified him on August 29, 1990, of the situation. Mr. Vasil assured counsel for Respondent that the inadvertent error could in fact be rectified by a supplemental brief. A letter confirming this conversation was sent to Mr. Vasil and to Mr. Griffin on August 29, 1990. Counsel for Respondent apologizes to the Court and to Petitioner for the error.

In light of the foregoing, the second, third and fourth reasons proffered by Respondent in his brief in opposition, pages 6 to 13, should be disregarded by this Court and the following second, third and fourth reasons substituted in lieu thereof. The first, fifth, sixth, seventh, eighth and ninth reasons in opposition to the petition for writ of certiorari contained in Respondent's brief in opposition are unaffected by the error.

REASONS FOR DENYING THE WRIT OF CERTIORARI

2. PETITIONER PROCEDURALLY BYPASSED THE COURT OF CRIMINAL APPEALS BY FAILING TO PRESENT IN ANY MANNER, IN ITS RESPONSE BRIEF, THE QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI.

The "question presented" is:

> "Whether the Texas Court of Criminal Appeals has misapplied the Rule of Jackson v. Virginia, 443 U.S. 307 (1979) by holding that the prosecution is under an affirmative duty to disprove every hypothesis except that of guilt beyond a reasonable doubt." Pet. at i.

Petitioner has complied with Rule 21.1(h) of the Rules of this Court by stating, pet. at 2, that "in this motion for rehearing the state specifically alleged that the Texas Court of Criminal Appeals had misapplied the rule of *Jackson v. Virginia*, 443 U.S. 307 (1979)". Although Respondent contends that Petitioner did not adequately preserve the "question presented" in its motion for rehearing (see number 3, *infra*), Petitioner's statement is an undeniable concession that Petitioner failed to present the "question presented" at any point in time prior to the motion for rehearing. Respondent asserts that this concession and the ramifications thereof justify a denial of certiorari.

Petitioner had the clear opportunity to raise the "question presented" in the Court of Criminal Appeals. In Respondent's opening brief, the standard of review was stated to be the following with respect to the grounds of error addressed by the Court of Criminal Appeals in its opinion:

> "Under *Jackson v. State*, 672 S.W.2d 801, 803 (Tex. Cr. App. 1984), the standard of review is that set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). In applying that test, this Court has agreed that the 'exclusion of outstanding reasonable hypotheses' test is still applicable. Id. at 803 citing *Denby v. State*, 654 S.W.2d 457 (Tex. Cr. App. 1983)." (as to liability as the sole actor: Ground of Error No. 7; Respondent's brief at pages 25-26)

> "Thus, while the circumstances are suspicious, a jury is not allowed to convict on speculation, *Jackson v. State*, 536 S.W.2d 371, 375 (Tex. Cr. App. 1976), and suspicion does not justify an affirmance by this Court; only proof beyond a reasonable doubt. *Waldon v. State*, 579 S.W.2d 499 at 502 (Tex. Cr. App. 1979)." (as to liability as a party; Ground of Error No. 6; Respondent's brief at page 23).

In Petitioner's brief filed in response to Respondent's opening brief, Petitioner totally failed to set forth any standard of review, let alone present to the Court of Criminal Appeals any assertion that the standard cited to it by Respondent was inconsistent with *Jackson v. Virginia, supra*. Petitioner's brief at pages 5 to 23. In fact, Petitioner only cited one case: *Rodriquez v. State*, 496 S.W.2d 46 (Tex. Cr. App. 1973), which addressed knowledge and control over narcotic drugs and did not address, directly or indirectly, the "question presented" in Petitioner's submission to this Court. Accordingly, Petitioner failed to afford the Court of Criminal Appeals the opportunity to pass upon the question it has presented to this Court. The failure to afford the Court of Criminal Appeals an opportunity to pass upon the question it seeks this Court to review is a procedural bypass of the Court of Criminal

Appeals. *See Bloeth v. New York*, 369 U.S. 133, 82 S.Ct. 661, 7 L.Ed.2d 780 (1962) [Mr. Justice Harlan, on application for stay of execution, stated that "it appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until the second motion for reargument. In such circumstances it is clear that this Court would be without jurisdiction to consider them"]; *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) [outlining policy reasons why a petitioner must present to the state court the question he desires to present on certiorari or appeal]. Petitioner's procedural default justifies the denial of certiorari.

3. PETITIONER PROCEDURALLY BYPASSED THE COURT OF CRIMINAL APPEALS BY FAILING TO PRESENT, ON MOTION FOR REHEARING, ANYTHING BUT A CURSORY SUGGESTION THAT THE COURT HAD MISAPPLIED JACKSON V. VIRGINIA.

Respondent contends that Petitioner procedurally bypassed its opportunity to complain to this Court by virtue of its failure to properly brief the issue in its motion for rehearing to the Court of Criminal Appeals. At page 10 of the State's Motion For Rehearing, Petitioner stated, as its entire position and "brief", the following:

> "Without waiving the foregoing the State respectfully urges that the Court has misapplied the teaching of *Jackson*, supra, by embracing the 'exclusion of reasonable hypothesis rule' whether as rule of law or analytical construct. It is the holding of the United States Supreme Court that the rule has no application under the *Jackson* standard. Rather than adopt the standard espoused by the Supreme Court's opinion

> the Court has applied this rule in, as Justice McCormick notes in Butler, *supra* at 244, in a 'disturbingly selective' fashion. There should be but one standard in circumstantial evidence cases and the analysis used should not depend upon the type or severity of the offense."

In Petitioner's motion for rehearing to the Court of Criminal Appeals, Petitioner presented five points of error, as follows:

> "Point of Error Number One: The Court erred in holding that the reasonable hypothesis of the Appellant must be excluded to a moral certainty."
>
> "Point of Error Number Two: The hypothesis relied on by the Court, i.e., that another unbeknownst to the Appellant committed the offense, is not a reasonable hypothesis."
>
> "Point of Error Number Three: The facts of the instant case are distinguishable from *Nathan* and *Flores* and the evidence is sufficient to uphold the conviction."
>
> "Point of Error Number Four: It is proper to uphold Appellant's conviction based on his status as a party."
>
> "Point of Error Number Five: The Court has incorrectly applied the Rule of Jackson v. Virginia."

See Petitioner's motion for rehearing, contained in Exhibit 2 to Respondent's response to Petitioner's motion to stay issuance of mandate filed with this Court on or about July 16, 1990.

Under Point of Error Number One in its motion for rehearing, (i.e., Exhibit 2 attached to Respondent's

response at page 3), Petitioner stated the following to the Court of Criminal Appeals:

> "The proper standard to apply in circumstantial evidence cases has known no little argument. *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989). *The current accepted status of the test holds that there are two components: first* that " . . . after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); and *second, "A conviction based on circumstantial evidence must exclude every other reasonable hypothesis except the guilt of the accused* . . . It is not required that the circumstance should, to a moral certainty, actually exclude every hypothesis that the act may have been committed by another person, *but that the hypothesis is a reasonable one consistent with the circumstances and the facts proved . . . Each fact need not point directly and independently to the guilt of the accused, as the cumulative effect of all the incriminating facts may be sufficient to support the evidence." Carlsen v. State*, 654 S.W.2d 444, 447 (Tex. Cr. App. 1983); *Butler*, **supra** 238 footnote 1. *The second step in this application, the exclusion of the reasonable hypothesis, is well settled in Texas Criminal Jurisprudence, and is "implicit" in any review based on* **Jackson**, *Butler supra, id."* (emphasis added)

Thus, in its motion for rehearing, Petitioner first took the position that the standard employed by the Court of Criminal Appeals was a matter of state law and that the Court had incorrectly utilized as part of that state law standard the "moral certainty" component. The State then took an alternative and inconsistent position that the

Court had misapplied this Court's standard of *Jackson*, but did so without adequate, let alone full, briefing and argument. Indeed, as reflected in the quotation reflecting the State's entire position on rehearing, the State did not even mention a constitutional provision or attempt to set up any claim under any constitutional provision. Under state law, the failure to properly and adequately brief and argue this "point of error" was a procedural default in the Court of Criminal Appeals. See *McWherter v. State*, 607 S.W.2d 531 at 536 (Tex. Cr. App. 1980); *McCambridge v. State*, 712 S.W.2d 499 at 501 n.9 (Tex. Cr. App. 1986). *See also Bloeth v. New York, supra; Webb v. Webb, supra.* Petitioner's procedural default justifies the denial of certiorari.

4. PETITIONER SHOULD BE ESTOPPED FROM PRESENTING THE "QUESTION PRESENTED" TO THIS COURT SINCE PETITIONER REPRESENTED TO THE COURT OF CRIMINAL APPEALS THAT THE "EXCLUSION OF OUTSTANDING REASONABLE HYPOTHESIS TEST" WAS PROPER AND WELL ESTABLISHED UNDER STATE LAW AND IMPLICIT IN ANY REVIEW BASED ON JACKSON V. VIRGINIA.

As reflected above in the quotation from Petitioner's motion for rehearing to the Court of Criminal Appeals, (see Exhibit 2 attached to Respondent's response at page 3), Petitioner affirmatively stated that the utilization of the "exclusion of outstanding reasonable hypothesis test" was proper, well established under state law, and implicit in any review based on *Jackson v. Virginia, supra.*

Notions of comity indicate that this Court should not review matters which were not FULLY AND FAIRLY

presented and briefed to the Court of Criminal Appeals. *Webb v. Webb, supra.* Furthermore, Petitioner's express representations contained in its motion for rehearing concerning the propriety of the "exclusion of outstanding reasonable hypothesis test" should be held as inconsistent with its position at trial and on appeal. Under the ruling in *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981), the Government may not raise issues before this Court:

> " . . . when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." *Id.*, at 1646.

Cf. Wilson v. State, 692 S.W.2d 661 (Tex. Cr. App. 1984) [citing and following *Steagald*]. Since Petitioner actually affirmatively represented that the standard utilized (i.e., "the exclusion of outstanding reasonable hypothesis test") was well settled in " . . . Texas Criminal Jurisprudence and is 'implicit' in any review based on *Jackson* . . . ", Petitioner should not now be allowed to assert otherwise. This change in position did not afford the Court of Criminal Appeals an opportunity to address, directly or indirectly, the question presented in its certiorari petition, and therefore, this Court should deny certiorari.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that in light of the nine reasons submitted in Respondent's brief (i.e., reasons 1, and 5 through 9) and in Respondent's supplemental brief (i.e., substituted reasons 2, 3 and 4), this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

DAVID L. BOTSFORD
Counsel of Record

ALVIS, CARSSOW, CUMMINS,
HOEFFNER & BOTSFORD, P.C.
800 Southwest Tower
7th at Brazos
Austin, Texas 78701
512/476-9121